

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling Filed By)	
SunCom, and Opposition and Cross-)	
Petition for Declaratory Ruling Filed By)	
Debra Edwards, Seeking Determination)	WT Docket No. 05-193
of Whether State Law Claims Regarding)	
Early Termination Fees Are Subject)	
To Preemption Under 47 U.S.C.)	
Section 332(c)(3)(A))	
)	
Petition for Declaratory Ruling Filed)	
By CTIA Regarding Whether Early)	WT Docket No. 05-194
Termination Fees Are "Rates Charged")	
Within 47 U.S.C. Section 332(c)(3)(A))	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Early Termination Fees (“ETFs”) are a critical element of both the rates and rate structures of Commercial Mobile Radio Service (“CMRS”) carriers, and allow CMRS carriers – such as Nextel – to offer affordable, nationwide calling plans to customers throughout the country. Any move to allow state laws, regulations or judicial proceedings to regulate ETFs would not only violate Section 332(c)(3)(A) of the Communications Act, but it would also serve to Balkanize the CMRS industry and destroy the ability of CMRS carriers to offer the type of innovative, nationwide service plans that consumers demand. Accordingly, Nextel urges the Commission to issue an expedited declaratory ruling: 1) confirming that early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A) of the Act; 2) holding that the use of any state law, regulation or judicial proceeding to prohibit the use of early termination fees by CMRS providers constitutes prohibited rate regulation, and is therefore preempted under Section 332(c)(3)(A); and 3) denying the “list of declaratory rulings sought” in the Edwards Opposition and Cross-Petition for Declaratory Ruling.

In the early days of CMRS service, the initial cost of obtaining a handset was very high. These high costs – along with the often high per-minute or per-month charges for service – deterred many potential customers who wanted to sign up for service, but who could not afford the initial equipment costs or the per-minute or per-month service outlays. In response to these concerns, many CMRS providers – including Nextel – developed integrated or “bundled” rate plans that offered substantial up-front discounts on equipment and lower recurring monthly service fees, in exchange for a one or two-year service agreement. These agreements also generally contain an ETF component that

allows the CMRS provider to recover certain “sunk costs” – such as equipment subsidies and other customer acquisition costs – if a customer does not comply with the terms of the customer service agreement.

Nextel started using service agreements with an ETF feature in approximately September 2000. Under the terms of the service plans with an ETF, customers pay a two hundred dollar (\$200.00) ETF if they terminate service before the end of the contract term. Once the service agreement is satisfied, however, a customer may cancel service on that account at any time and for any reason without the imposition of the ETF. Through the use of ETFs, Nextel has been able to offer substantial initial handset discounts and lower monthly recurring fees that allow Nextel to remain competitive in the CMRS market. Furthermore, Nextel has found that most consumers prefer service agreements with ETFs because they allow them to receive a service plan at the lower price. For those customers who want a plan without an ETF component, Nextel also offers service options such as Boost Mobile, its pre-paid mobile service. The Boost service, however, is more expensive than term rate plans because there is no built-in mechanism for the pricing of that service to recover up-front costs over time.

Notwithstanding the success of term rate plans with ETFs, a recent flurry of lawsuits and state regulations now challenge the ability of Nextel – and other CMRS providers – to offer consumers the full range of choices they have come to expect in the wireless telecommunications market. If successful, these class action lawsuits and state regulations – such as the California Public Utilities Commission’s “Bill of Rights” – will severely limit Nextel’s ability to offer nationwide rate plans that provide up-front equipment discounts combined with reasonable monthly rate plans.

Under Section 332, the Commission has full authority over CMRS rates and rate elements. ETFs are a critical component of CMRS carrier rates because the existence – or absence – of an ETF in a customer agreement can substantially change the monthly or per-minute rate that a carrier must charge a customer to cover its costs. One of the key factors in setting rate plan pricing is an analysis of the up-front acquisition costs, including set-up expenses and equipment subsidies. Many of the up-front costs can be very substantial. Thus, carriers often set rates based on the amount of time they can recover costs from prospective customers. The ETF plays a critical role in this rate setting equation by ensuring that a carrier's costs are covered either through monthly rates during the term of a service contract, or through the ETF if a customer terminates service. If the ETF rate element in carrier contracts were eliminated – or even restricted – it would likely result in higher up-front costs and monthly fees for most customers. In the past, both the Commission and a number of courts have found that termination fees are directly linked to carrier rates. Accordingly, the Commission should take this opportunity to again confirm that ETFs are CMRS rates pursuant to Section 332(c)(A)(3), and stop the flood of class action lawsuits and state regulations that threaten the continued offering of competitively priced, national post-paid CMRS rate plans.

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EXHIBIT 1

EXHIBIT 2

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel") hereby submits these comments pursuant to the Federal Communications Commission's ("FCC" or "Commission") March 18, 2005, Public Notices¹ requesting comment on Petitions from the Cellular Telecommunications & Internet Association ("CTIA")² and SunCom Wireless Operating

¹ See *Wireless Telecommunications Bureau Seeks Comment on Petitions for Declaratory Ruling Filed By Suncom, and Opposition and Cross-Petition for Declaratory Ruling Filed By Debra Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)*, WT Docket No. 05-193 (rel. May 18, 2005); *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A)*, WT Docket No. 05-194 (rel. May 18, 2005).

² See Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling Confirming that: (1) Early Termination Fees in Wireless Service Contracts Are "Rates Charged" for Commercial Mobile Services Within the Meaning of Section 332(c)(3)(A) of the Communications Act and FCC Precedent; and (2) Any Application of State Law by a Court or Other Tribunal to Invalidate, Modify, or Condition the Use or Enforcement of ETFs Based, in Whole or in Part, Upon an Assessment of the Reasonableness, Fairness, or Cost-Basis of the ETF, or to Prohibit the

Company, L.L.C. f/k/a Triton PCS Operating Company, L.L.C. (“SunCom”)³ seeking a declaratory ruling confirming that early termination fees (“ETFs”) in Commercial Mobile Radio Service (“CMRS”) contracts are “rates charged” within the meaning of Section 332(c)(3)(A) of the Communications Act, as amended.

I. INTRODUCTION AND BACKGROUND

Nextel is the Nation’s fifth largest provider of CMRS, including cellular telephone service, Direct Connect® (Nextel’s walkie-talkie feature) and data services. Together with its affiliate, Nextel Partners, Nextel currently covers 297 of the top 300 metropolitan areas in the United States, and serves over 17 million customers. Nextel’s services are provided through a national network of integrated cell sites, Mobile Switching Centers (“MSCs”) and associated networking equipment that provide a consistent, uniform wireless service. In addition, Nextel has a single, uniform billing system and customer support operations staff that provides consistent, uniform customer service throughout the United States.

Due to the national reach of its network and customer operations staff, Nextel is able to vigorously compete with other national, regional and local providers of CMRS services by offering a wide selection of nationwide calling packages. In response to customer demand, many of Nextel’s rate plans “bundle” discounted equipment and/or low up-front fees, as well as monthly, recurring service fees, with a one or two-year rate plan. These bundled rate plans also generally contain a provision requiring a customer to

Use or Enforcement of ETFs as Unlawful “Liquidated Damages” or Penalties, Constitutes Prohibited Rate Regulation and Is Therefore Preempted by Section 332(c)(3)(A) (filed March 15, 2005) (hereinafter “CTIA Petition”).

³ See SunCom Operating Company L.L.C. Petition for Declaratory Ruling (filed Feb. 22, 2005) (hereinafter “SunCom Petition”).

pay an ETF if they cancel their service prior to the expiration of the term spelled out in their subscriber agreement so that Nextel can recover its substantial equipment and up-front account set-up expenses. Absent term contracts and associated ETFs, carriers would not be able to offer customers these lower, competitively priced equipment and rate plans – the very plans that have made wireless services available to all Americans.

ETFs, therefore, are a critical element of both the rates and rate structures of CMRS carriers, and allow CMRS carriers – such as Nextel – to offer affordable, nationwide calling plans to customers throughout the country. Any move to allow state regulation of ETFs would not only violate Section 332(c)(3)(A) of the Communications Act, but it would also serve to Balkanize the CMRS industry, and destroy the ability of CMRS carriers to offer the type of innovative, nationwide service plans that consumers demand. Accordingly, Nextel urges the Commission to issue an expedited declaratory ruling: 1) confirming that early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A) of the Act; 2) holding that the use of any state law, regulation or judicial proceeding to prohibit the use of early termination fees by CMRS providers constitutes prohibited rate regulation, and is therefore preempted under Section 332(c)(3)(A); and 3) denying the “list of declaratory rulings sought” in the Edwards Opposition and Cross-Petition for Declaratory Ruling.⁴

⁴ *Debra Edwards, et al. Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings* (filed March 4, 2005) (hereinafter “Edwards Opposition”). Specifically, Nextel requests that the Commission deny the “list of declaratory rulings sought” in Appendix D of the Edwards Opposition.

II. EARLY TERMINATION FEES ARE A CRITICAL COMPONENT OF NEXTEL’S RATES

A. The Use of Early Termination Fees Allows Nextel – and Other CMRS Providers – to Offer Affordable Monthly Service Packages to Consumers

In the early days of commercial mobile service, the initial cost of obtaining a handset was extremely high. These high costs deterred many potential wireless customers who wanted to sign up for service, but who could not afford the very high initial cost of obtaining a handset or the often high per-minute or per-month charges for using the service. In response to these concerns, many CMRS providers developed integrated or “bundled” rate plans that offered substantial up-front discounts on equipment and lower recurring monthly service fees, in exchange for a one or two-year service agreement.

Under these agreements, the initial equipment costs are recouped through monthly fees or rates that are charged during the term of the contract – a term that is designed to ensure that the carrier can recover the up-front costs not otherwise charged to the customer. These agreements contain provisions specifically stating that a customer will incur an “early termination fee” if the customer terminates service prior to the expiration of the service agreement. The use of this ETF feature allows CMRS providers to recover certain “sunk costs” – such as equipment subsidies and other customer acquisition costs – if a customer does not comply with the terms of the service agreement.

In an effort to provide bundled equipment and rate plans that were highly competitive with the offerings of other CMRS providers, Nextel started using service agreements with an ETF feature in approximately September 2000. Under the terms of the service plans with an ETF, customers pay a two hundred dollar (\$200.00) ETF if they

terminate service before the end of the contract term. Once the service agreement term is satisfied, however, a customer may cancel service on that account at any time and for any reasons without the imposition of the ETF.

Through the use of ETFs in service agreements, Nextel has been able to offer substantial initial handset discounts and lower monthly recurring fees that allow Nextel to remain competitive in the fiercely competitive CMRS market. These subsidies are critically important in Nextel's case because it has some of the highest handset and equipment costs in the industry – primarily due to Nextel's almost exclusive reliance on Motorola handsets that are compatible with the company's iDEN® network.⁵ Without the ability to offset those up-front costs with a term agreement containing an ETF component, Nextel would be unable to offer certain types of bundled rate plans that are necessary to compete in the CMRS marketplace.

Furthermore, Nextel has found that most consumers prefer service agreements with ETFs because they allow customers to receive a service plan at the lowest price. In

⁵ See Nextel Communications, Inc., United States Securities and Exchange Commission Form 10-K for the Fiscal Year Ending December 31, 2004, at 26 (available at <http://www.nextel.com>).

With the exception of BlackBerry devices, which are available only from RIM, we currently market multi-function digital handsets available from only one supplier, Motorola. Although our handset supply agreement with Motorola is structured to provide competitively priced handsets, the cost of our handsets may nonetheless be higher than analog handsets and digital handsets that do not incorporate a similar multi-function capability, which may make it more difficult or less profitable for us to attract customers. In addition, the higher cost of our handsets requires us to absorb part of the cost of offering handsets to new and existing customers. These increased costs and handset subsidy expenses may reduce our growth and profitability.

Id.

negotiations with large, high-volume customers where Nextel has the flexibility to use different terms and conditions of service, Nextel has found that those customers – when given the option of a rate plan with no ETF but higher per-minute or per-month costs – generally choose a term plan with an ETF and lower overall prices.

For those customers who want a plan without ETFs – or any service agreement whatsoever – Nextel offers other service options such as Boost Mobile, its pre-paid mobile service. The Boost service, however, is more expensive than term rate plans because there is no built-in mechanism in the pricing of that service to recover up-front costs over time. For example, the i730 handset costs \$124.99 for those Nextel customers who sign a service agreement with a two-year commitment period and an associated ETF.⁶ The same phone on a Boost Mobile rate plan – which contains no minimum term commitment or ETF – is \$179.99.⁷ Similarly, a comparison of the per-minute cost of plans with a term commitment and ETF and those without a term commitment show that customers on term agreements with ETFs pay lower per-minute or per-month service fees. For instance, Boost customers pay, on average, \$0.20 per minute for peak time usage and \$0.10 per minute for off-peak usage.⁸ In addition, a \$1.50 per day charge is

⁶ See Nextel Phone Offerings, *available at* http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPhones?id4=left_nav:phones (visited August 4, 2005) (noting that the i730 handset is available for \$124.99 with a two-year service commitment).

⁷ See Boost Mobile Phone and Accessories, *available at* http://www.boostmobile.com/nw_bshop_i730.html (visited August 4, 2005) (offering the i730 handset for \$179.99).

⁸ See Boost Mobile Rate Plans, *available at* http://www.boostmobile.com/bshop_rate_plans.html (visited August 4, 2005).

levied on Boost plans for Direct Connect® service.⁹ In contrast, a Nextel customer on a term rate plan with an ETF offering 500 peak minutes pays, on average, \$0.09 per-minute for the peak included minutes.¹⁰ In addition, Direct Connect and off-peak cellular calling are offered at no additional charge.¹¹

As demonstrated above, the lower rate plan pricing offered in a term plan exists because a carrier is able to spread up-front equipment and acquisition costs across a fixed term, and rely on an ETF to recover some of its “sunk costs” if a customer discontinues service prior to the expiration of its terms. The ability to spread these costs, however, is not available under a pre-paid or “no term” plan, and the prices charged under those plans reflect this. Therefore, ETFs are not only a critical component of Nextel’s rates and rate structures, they are critical to providing customers the affordable, competitively priced wireless services they have come to expect from the CMRS industry.

B. Nextel Provides Full, Up-Front Disclosure of Its Early Termination Fees In Advertising and Subscriber Agreements

Nextel takes numerous steps to ensure that all potential customers are informed of all service plan options and features prior to the time that they enter into an actual service agreement. In the case of ETFs, Nextel takes numerous steps to ensure that customers know of both the existence of ETFs in certain service plans, and how the ETF functions in the event that they cancel service prior to the end of their service terms.

⁹ See *id.*

¹⁰ See Nextel Rate Plans, available at <http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans> (visited August 4, 2005) (stating the availability of the Nextel 500 National Power Plan for \$45.99, plus applicable taxes, fees and additional charges).

¹¹ See *id.*

Nextel provides notice in almost all printed advertising that a “\$200 early termination” fee applies in cases where a customer cancels a service agreement before the term expires. Nextel also provides “pop-up” notices on its website alerting potential customers shopping for rate plans with an ETF component that a “\$200 early termination fee applies, after 15-day trial period.”

Furthermore, when a customer actually enters a service contract with Nextel containing an ETF component, they are informed at least twice as to both the existence of the ETF, as well as the cost of the ETF if they terminate the agreement prior to its term. First, the actual terms of Nextel’s Subscriber Agreement provide, in part, that early termination of a service agreement will result in a fee of “\$200 for each number assigned to customer’s account as a reasonable estimate of the damages incurred by Nextel.”¹² In

¹² The complete text of the Early Termination Fee provisions in Nextel’s Subscriber Agreement (attached as Exhibit 1) provides as follows:

Early Termination Component of Rate Structure – Nextel incurs a significant cost in activating Service to Customer, including a large up-front cost in offering Equipment to Customer. These costs are partially recouped over the length of Customer’s Agreement with Nextel through monthly service rate charges to Customer, which have been established in part for this purpose. If Customer breaches this Agreement or terminates Service for any reason (including by porting its Phone number to another service provider), Customer understands and acknowledges that Nextel will not receive the full benefit of its Agreement with Customer, in part, because Nextel will not continue to receive monthly service charges from customer. As a result, Nextel shall incur damages that are difficult, if not impossible, to determine. THEREFORE, IN THE CASE OF BREACH OR EARLY TERMINATION OF THE AGREEMENT BY CUSTOMER, CUSTOMER SHALL PAY TO NEXTEL, AS LIQUIDATED DAMAGES AND NOT AS A PENALTY (IN ADDITION TO ALL AMOUNTS THEN OWED TO NEXTEL), \$200 FOR EACH NUMBER ASSIGNED TO CUSTOMER’S ACCOUNT AS A REASONABLE ESTIMATE OF THE DAMAGES INCURRED BY NEXTEL. This is intended to maintain Nextel’s overall rate at an acceptable level despite

addition, Nextel's Subscriber Agreement also provides – on the first page – an “Expectation Checklist” that a customer must read and verify prior to entering a service contract. One of the key provisions of the Expectation Checklist – which a customer must check off and verify prior to entering an agreement – is a statement that the customer was provided “guidance or information” on “Nextel's policy governing early termination of all or a portion of your service and the associated \$200 termination fee per number terminated.” Through this process, Nextel ensures that all customers entering a one or two-year service agreement are fully aware of the existence of an ETF in their service contract, the up-front equipment discount benefit provided as a result of the contract, and the fee that a customer will incur if they terminate their rate plan prior to the expiration of the service contract.

III. A FLOOD OF LAWSUITS AND STATE REGULATIONS REGARDING EARLY TERMINATION FEES THREATENS TO UNDERMINE NEXTEL'S ABILITY TO OFFER COMPETITIVELY PRICED NATIONAL RATE PLANS

As detailed above, Nextel's use of bundled rate plans that combine initial deep discounts on equipment and lower monthly fees in exchange for a minimum service commitment has proven very popular in the marketplace, and has outpaced demand for pre-paid or other service plans that do not provide initial equipment discounts.

Notwithstanding the success of these rate plans, however, a recent flurry of lawsuits and state regulations now challenge the ability of Nextel – and other CMRS providers – to offer consumers the full range of choices that they have come to expect in the wireless telecommunications market. If successful, these suits will severely limit Nextel's ability

Customer's early termination and will be assessed without exception unless otherwise provided in this Agreement or by applicable law.

to offer nationwide rate plans that provide up-front equipment discounts combined with reasonable monthly rate plans.

A. Nextel and Other Providers Currently Face a Number of Class Action Suits Regarding Early Termination Fees

As detailed in the CTIA Petition, there has been a recent wave of lawsuits filed against CMRS providers that utilize ETFs as part of their rate plan offerings.¹³ Of these lawsuits, Nextel is named as a defendant in at least two. In both cases, the plaintiffs claims that Nextel's ETF violates various provisions of state consumer protection laws, or somehow represents an unfair contractual obligation. In fact, these suits should be seen for what they really are – attempts to regulate CMRS carrier rate plans through litigation.

In California, Nextel is currently named as a defendant in a consolidated series of class action suits challenging the legality of ETFs.¹⁴ In all of the suits, the common claim appears to be that ETFs somehow unjustly enrich wireless carriers, and that the ETFs contained in carrier contracts are not reasonable in relation to carrier losses from early termination. The relief sought in these cases, however, strikes at the core of carriers' rate structure by demanding not only restitution of what plaintiffs perceive as ill-gotten gains, but also an injunction preventing CMRS carriers from either enforcing ETFs in existing contracts or including ETFs in future contracts.

¹³ See CTIA Petition at 2-7.

¹⁴ See *California Cellphone Termination Fee Cases*, State of California, County of Alameda, Case No. JCCP004332 (Cal. Super. Ct. Feb. 11, 2004).

Nextel is also the target of a Florida lawsuit challenging the validity of ETFs.¹⁵ In the *Carver Ranches* case, plaintiffs claim – among other things – that Nextel’s ETF violates Florida’s Deceptive and Unfair Trade Practices Act,¹⁶ is a “contract of adhesion under Florida law,”¹⁷ and that the ETF constitutes an “unconscionable, void and unenforceable” penalty under Florida law.¹⁸ Like the California case, this lawsuit also requests that Nextel “cease and desist all deceptive, unjust, and unreasonable practices described herein.”

However, while the named plaintiff in the *Carver Ranches* case claims that Nextel somehow engaged in “deceptive” and “unreasonable” practices, the depositions conducted as part of the discovery in the case present a far different picture. In fact, when the named plaintiff was questioned as to whether he knew that an ETF was part of the contract prior to signing it, he answered in the affirmative.¹⁹ The plaintiff in the case

¹⁵ See *Carver Ranches Washington Park, Inc. v. Nextel South Corp. d/b/a Nextel Communications*, State of Florida, Palm Beach County, Case No. 50 2004 CA 005062 (15th Jud. Cir. Ct. May 17, 2004) (hereinafter “*Carver Ranches*”).

¹⁶ *Carver Ranches*, Class Action Complaint for Damages and Demand for Jury Trial (filed May 17, 2004) at 7 (hereinafter “*Carver Ranches Complaint*”).

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 7.

¹⁹ See *Carver Ranches*, Videotaped Deposition of Bertram Bowe Taken on Behalf of the Defendant (Jan. 25, 2005), at 12 (attached as Exhibit 2).

Q: Did you understand that if you discontinued Nextel service prior to the time the contract expired, that there would be an early termination fee?

A: Yes.

Q: Did you understand that if you were a subscriber and paid your fees throughout the life of the year contract, after the year contract – after a year, the

also responded that he understood that the contract – and the ETF component of the contract – would expire after a year.²⁰ In this context, the suit is not challenging any deceptive or misleading practices concerning the existence of the ETF; rather it is challenging the very existence of the ETF and Nextel’s overall rate structure.

B. State Regulations – Such as the California Public Utility Commission’s “Consumer Bill of Rights” – Also Seek to Regulate the ETF Component of CMRS Carriers’ Rates

In addition to class action lawsuits, certain state laws and regulations also seek to regulate CMRS carriers’ use of ETFs in wireless rate plan offerings. In California, for instance, the California Public Utilities Commission’s (“CPUC”) “Consumer Bill of Rights” mandates that customers be allowed a 30-day “trial period” before an ETF could be assessed on a terminated contract.²¹ While this regulatory requirement has been

contract would then automatically change to a month-to-month contract with no ETF’s? [sic]

A: Yes.

Id.

²⁰ *Id.*

²¹ See *California Public Utilities Commission, Rules Governing Telecommunications Consumer Protection*, Decision 04-05-057 in Rulemaking 00-02-004) (adopted May 27, 2004), at Rule 3(f) (prohibiting carriers from charging an early termination fee within the first 30 days of service if a customer chooses to terminate their service agreement contract).

temporarily suspended pending further review by the CPUC,²² the California Legislature has been considering a bill that would impose a similar requirement by law.²³

While both the CPUC regulation and the California legislation claim that they would enhance consumers' options, the opposite is in fact true. By seeking to regulate the rate structures of post-paid CMRS service plans, both proposals would almost certainly restrict the availability of new, innovative equipment and service offerings to consumers.²⁴ Furthermore, it is critical to note that this impact would not just be limited to California consumers. Due to nationwide advertising and the ubiquity of "one-rate" CMRS offerings, most CMRS providers offer their rate plans on a nationwide basis. Therefore, a single state's regulation of the use and/or amount of ETFs could impact all of Nextel's customers nationwide. Moreover, carriers could find themselves faced with inconsistent regulation of the use and/or amount of ETFs from state-to-state, making compliance difficult and expensive – if not operationally impossible – under current billing systems that are oriented on a national level.

²² See *California Public Utilities Commission, Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Rulemaking 00-02-004, Order Modifying Decision 04-05-057 (adopted Jan. 27, 2005).

²³ S.B. 1068 (Ca. 2005).

²⁴ The Commission has also expressly recognized the threat of patchwork state regulation, noting that state regulations dictating the presentation of line-items on CMRS billing statements "directly affect CMRS carriers' rates and rate structures in a manner that amounts to rate regulation." *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, ¶ 31 (2005).

C. The Success of Any of the Class Action Suits, Or Other State Regulation, Could Balkanize the CMRS Market and Destroy the Success of National Post-Paid Rate Plans

If any of the class action suits or state efforts to eliminate ETFs succeed, it will likely lead carriers to eliminate or substantially modify current rate plans that provide significant equipment subsidies in exchange for a minimum service commitment. The net result of this will be much higher “up-front” equipment costs for consumers and higher monthly fees, or the complete separation of handset costs from post-paid carrier rate plans. As the Commission is well aware, this approach was tried in California prior to passage of the 1993 Budget Act amendments²⁵ – with anti-consumer results. In California, wireless carriers were prohibited from “bundling” handsets with rate plans until the CPUC ended this regulation – following the Commission’s 1994 *CMRS Second Report and Order* – in 1995.²⁶ The net result of this regulation in California was wireless penetration rates that lagged substantially behind other states where CMRS rates were not regulated.²⁷ If that type of rate regulation were re-introduced today – through state

²⁵ See Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312, 387-97 (1993) (hereinafter “1993 Budget Act”).

²⁶ See *California Public Utilities Commission, Investigation on the Commission’s Own Motion into the Regulation of Cellular Radiotelephone Utilities*, Decision No. 95-04-028, Investigation No. 88-11-040, 1995 Cal. PUC LEXIS 175, *1 (1995) (“In this decision, we substantially relax our prohibition against the practice of ‘bundling,’ the combined sale of discounted cellular telephone equipment and tariffed cellular service.”).

²⁷ See *id.*

The practice of bundling in other states has alleviated the major deterrent to initial cellular service subscription, the high cost of the cellular phone, by lowering the consumer’s initial outlay for the equipment. [Cellular Resellers Association, Inc.’s] witness stated that “phone prices consumers face would in all likelihood fall with the introduction of bundled equipment and service.” There is no dispute that cellular telephone prices in California are higher, and often substantially higher, than the prices

regulation of ETF rate elements – it would likely impair competition in a similar manner. The impact of such regulation would also likely have a disproportionate impact on lower-income consumers, who may not be able to afford the substantial up-front costs associated with non-subsidized equipment.

Furthermore, as discussed briefly above, the impact of such state regulation or judicially-imposed mandates would not be limited solely to one state. Unlike the situation prior to 1994, when wireless providers generally offered rate plans on a regional or statewide basis, CMRS providers now compete on a national basis. To do this, most national carriers have built integrated, national billing and customer service networks. In this environment, it is extremely difficult to separate all of the costs – or the impact – of state rules and regulations from national rate plans. Accordingly, the impact of rules, regulations, or other mandates arising from these state proceedings will be felt nationwide. This is not what Congress intended when it passed the Budget Act in 1993, nor what this Commission expected when it deregulated CMRS rates in 1994.²⁸

charged for the same telephones, when bundled with service, in states which permit bundling.

Id. at *31-32. *See also* Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 222-23 (2003) (“Rates in regulated states were generally higher than rates in unregulated states prior to federal preemption. Service provision in regulated states appears to have lagged (started later) than in unregulated states.”).

²⁸ *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994) (hereinafter “CMRS Second Report and Order”) (“[E]nforcement of Section 203 [the requirement to file tariffs] is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.”).

IV. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT EARLY TERMINATION FEES ARE PART OF CMRS CARRIER RATES PURSUANT TO SECTION 332(c)(3)(A) OF THE COMMUNICATIONS ACT

A. The Commission Has Full Authority Over CMRS Rates and Rate Structures

As reflected in the legislative history and provisions of the 1993 Budget Act, Congress plainly intended that wireless carriers be permitted to make the investments necessary to build and operate on a nationwide basis in a deregulated, competitive, market-driven environment. As part of this direction, Congress modified both Section 2(b) and 332 of the Communications Act to establish the Commission as the exclusive forum for the review of wireless carrier rates and market entry qualifications.²⁹ Section 332 expressly denies states “any authority to regulate the entry of or the rates charged by any commercial mobile service . . . carrier.”³⁰ While Section 332(c)(3)(A) acknowledges limited state authority to regulate “other terms and conditions of wireless services,”³¹ it is plain that a state may not engage in rate and entry regulation under the guise of regulating “other terms and conditions.”³² As the Commission has determined, “it is the substance, not merely the form of the state [provision], that determines whether it is preempted under Section 332.”³³

²⁹ See 1993 Budget Act, Pub.L.No. 103-66, 107 Stat. at 387-97.

³⁰ 47 U.S.C. § 332(c)(3)(A).

³¹ Id.

³² *Bastien v. AT&T*, 205 F.3d 983, 988 (7th Cir. 2000) (holding that a customer complaint over service quality was “really an attack on rates charged for services”).

³³ *Wireless Consumers Alliance, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 17021, 17037 (2000) (hereinafter “*Wireless Consumers Alliance*”).

The Commission's decisions in the *Southwestern Bell Mobile Systems, Inc.*³⁴ and *Wireless Consumers Alliance* cases provide specific guidance on the scope of Section 332 preemption. Southwestern Bell sought Commission preemption under Section 332 of state law challenges to a wireless carrier practice of "rounding up" charges for calls to the nearest whole minute. In rejecting the Petition, the Commission found that Section 332 did not "create a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws."³⁵ Significantly, however, the Commission emphasized that:

[T]he term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.³⁶

In *Wireless Consumers Alliance*, the Commission considered whether Section 332(c)(3)(A) prohibits state courts from awarding damages against wireless carriers in actions under state tort, contract and consumer fraud laws.³⁷ In this case, the Commission found that damage awards do not always amount to rate regulation, reasoning that "there is no necessary correspondence between the indirect effect that

³⁴ *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907 (1999) (hereinafter "*Southwestern Bell*").

³⁵ *Id.* at 19901.

³⁶ *Id.* at 19907.

³⁷ *Wireless Consumers Alliance*, 15 FCC Rcd at 17021.

monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior.”³⁸ Thus, the Commission attempted to distinguish between the indirect impact of permissible tort and contract actions with an “uncertain” effect on wireless carrier prices, and regulatory requirements with an impermissible “direct effect” on the rates that wireless carriers charge customers.

B. ETFs Are a Critical Component of CMRS Carrier “Rates”

ETFs are a critical component of CMRS carrier rates because the existence – or absence – of an ETF in a customer agreement can substantially change the monthly or per minute rate that a carrier must charge a customer to cover its costs. CMRS providers – like Nextel – offer service through a variety of rate plans that are made up of a number of components. One of the key factors in setting these rate plans is an analysis of the up-front customer acquisition costs, including set-up expenses and equipment subsidies. Many of the up-front costs can be very substantial. Thus, carriers often set rates based on the amount of time required to recover these costs from a prospective customer. The ETF plays a critical role in this rate setting equation by ensuring that a carrier's costs are covered either through monthly rates during the term of the service contract, or through the ETF if the customer terminates their agreement. If the ETF rate element in carrier contracts were eliminated – or even restricted – “the result would be higher service-initiation fees, and possibly higher monthly service fees to all customers so that carriers are able to recover the higher expected cost of serving the customers who take advantage of the extended penalty-free termination period.”³⁹

³⁸ *Id.* at 17034.

³⁹ See Debra J. Aron, Ph.D., *The Financial and Public Policy Implications of Key Proposed Telecommunications Protection Rules on California Wireless Carriers and*

In past cases, the Commission has found that termination fees are directly linked to CMRS carrier rates. In 1995, for instance, the Commission denied a Petition of the CPUC to retain regulatory authority over intrastate CMRS rates.⁴⁰ In rejecting the CPUC Petition, the Commission noted that while the “two major standard components” of CMRS prices are “monthly, flat-rate access charges and per-minute airtime charges, customer bills are driven in part by other variables, including ‘free’ airtime offered with certain pricing plans, *termination charges* (if any) and contract length (monthly or over a period of months or years.”⁴¹ In the wireline context, the Commission has also similarly found that early termination-type charges are part and parcel of a carrier’s rate structure.⁴²

Customers: Economic Analysis, at 35 (Feb. 2003), available at <http://www.pacificresearch.org/pub/sab/techno/wireless/AronPaper.pdf>

⁴⁰ See *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, Report and Order*, 10 FCC Rcd 7486 (1995) (hereinafter “CPUC Petition”).

⁴¹ See *id.* at 7536 (emphasis added).

⁴² See, e.g., *Ryder Communications, Inc. v. AT&T Corp., Memorandum Opinion and Order*, 18 FCC Rcd 13603, 13617 (2003).

The Commission has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments. Many of these provisions required individual customers, like Ryder, to pay charges similar, if not equivalent to, the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments. *In approving these provisions, the Commission recognized implicitly that they were a valid quid pro quo for the rate reductions contained in long-term plans.*

Id. (emphasis added). See also *AT&T Comms. Tariff F.C.C. Nos. 2 and 14, Transmittals Nos. 4974, 5149, and 5383*, 8 FCC Rcd 4543, n. 4 (1993) (allowing an AT&T tariff containing plans with “discounts from AT&T in return for terms and

Furthermore, a number of courts have also determined that ETFs are part of a CMRS carrier's rates. For instance, in *Aubrey v. Ameritech Mobile Communications, Inc.*, the United States District Court for the Eastern District of Michigan held that a challenge to a CMRS provider's use of an ETF was preempted because the ETF was a component of the "rates charged by [Ameritech] for its wireless services."⁴³ Similarly, in *Gilmore v. Southwestern Bell Mobile Systems*, the United States District Court for the Northern District of Illinois, the Court ruled that a challenge to a CMRS carriers' use of a "Corporate Account Administration Fee" was a "rate claim that falls within the purview of the [Federal Telecommunications Act] and which, as a state law claim, is preempted."⁴⁴

revenue commitments from the 800 Gold Service customer"). The AT&T plan at issue in this tariff filing also contained a termination provision. *Id.*

⁴³ 2002 WL 32521813, *3 (E.D. Mich. 2002).

[B]y alleging that the rates which AMC charged for terminating a subscriber's service were exorbitant, it is clear that the Plaintiff is challenging the rates charged by AMC for its wireless services. Based on these allegations, a decision in Plaintiff's favor would require a determination as to the type and adequacy of the technology that a wireless service provider, like AMC, must use in order to enter or serve a particular market. *Moreover, it would obligate AMC to lower its rates for those services.*

Id. (emphasis added). *See also Redfern v. AT&T Wireless Servs.*, 2003 U.S. Dist. LEXIS 25745, * 2-4 (S.D. Ill. 2003) (ETF "directly correlated to and is an integral part of the rates charged" by a CMRS provider); *Chandler v. AT&T Wireless Servs.*, 2004 U.S. Dist. LEXIS 14884, *3 (S.D. Ill. July 21, 2004) (ETF is "directly connected to the rates charged for mobile services").

⁴⁴ *Gilmore v. Southwestern Bell Mobile Systems*, 156 F.Supp.2d 916, 925 (N.D.Ill. 2001); *see also Alport v. Sprint Corp.*, 2003 WL 22872134, * 4 (finding a "complaint concerning the propriety of [a carrier-imposed] Federal E911 surcharge to be a rate challenge that fits squarely within the scope of federal jurisdiction").

V. SECTION 414 OF THE ACT DOES NOT “PRESERVE” A STATE ROLE IN REGULATING ETFs

In an apparent attempt to escape the plain federal rate and rate element preemption in Section 332, the Edwards Opposition claims that even if Section 332 preempts state regulation of ETFs, state law claims are still somehow valid due to the “savings clause” in Section 414 of the Act. In support of this claim, the Edwards Opposition lists a number of wireline cases – and even a case involving a “savings clause” in the Federal Aviation Act – as proof that the general savings clause in Section 414 preempts Congress’ specific direction on CMRS rates and rate elements in Section 332.⁴⁵ The Edwards Opposition’s Section 414 claim is wholly without merit, and should be rejected by the Commission.

One of the basic principles of statutory construction is that specific statutory provisions trump general provisions.⁴⁶ In this case, Section 332 specifically states that the states are preempted from regulating CMRS providers’ rates and rate elements. Section 414, on the other hand, merely states that the Act does not “abridge or alter the remedies now existing at common law or by statute.”⁴⁷ Reading Section 414 to mean that state common law or statutes trump specific provisions of federal law would “swallow” Section 332 – as well as many other provision of the Act. In the past, the courts have reviewed this legal theory, and swiftly rejected it. The United States District Court for the Eastern District of Pennsylvania noted, for instance, that Section 414 “*cannot*

⁴⁵ See Edwards Opposition at 42-46.

⁴⁶ See, e.g., 3 CHARLES H. KOCH, ADMIN. L. & PRAC. § 11.26 (2d ed. Supp. 2004-05) (noting the doctrine of *ejusdem generis* – “the general words should be governed by the specific”).

⁴⁷ 47 U.S.C. § 414.

plausibly be read to preserve state law claims that directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act.”⁴⁸ Similarly, a California appellate court reviewing a challenge to a CMRS providers’ airtime billing practices stated that Section 414 “‘cannot be allowed to supercede [a] specific substantive pre-emption provision’ – this would render the preemption provision meaningless.”⁴⁹ Section 332 plainly provides specific Congressional guidance regarding federal preemption of state efforts to regulate CMRS carrier rates. Accordingly, the Commission should reject the Edwards Opposition’s Section 414 claims.

⁴⁸ *In re Comcast Cellular Telecommunications Litigation*, 949 F.Supp. 1193, 1205 (E.D.Pa. 1996).

⁴⁹ *Ball v. GTE Mobilnet of California*, 96 Cal.Rptr.2d 801, 808 (Cal.Ct.App. 2000) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992)).

CONCLUSION

For the aforementioned reasons, Nextel respectfully requests that the Commission issue an expedited declaratory ruling: 1) confirming that early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A) of the Act; 2) holding that the use of any state law, regulation or judicial proceeding to prohibit the use of early termination fees by CMRS providers constitutes prohibited rate regulation, and is therefore preempted under Section 332 (c)(3)(A); and 3) denying the “list of declaratory rulings sought” in the Edwards Opposition and Cross-Petition for Declaratory Ruling.

Respectfully submitted,

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